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IN THE

Supreme Court of the United States

October Term, 1967

No. 562

ROBERT PUENTES,

Appellant,

v.

THE BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 21, TOWN OF BETHPAGE, NASSAU COUNTY, NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the New York State Court of Appeals, dated November 29, 1966, a motion for reargument thereof or in the alternative to amend the remittitur having been thereafter decided on April 11, 1967 by the denial of reargument and the granting of said motion insofar as it sought amendment of the remittitur. Said final judgment affirmed the judgment of the Appellate Division of the Supreme Court, Second Judicial Department, entered on July 19, 1965, which had affirmed the suspension and certain other punishment of Appellant assessed by the Appellee which had found Appellant guilty under § 3012 of the Education Law of the State of New York.

Opinions Below

The decision of the New York Court of Appeals is reported at 18 N.Y. 2d 906, 276 N.Y.S. 2d 638, 223 N.E. 2d 45. The opinions of the Appellate Division of the Supreme Court, Second Judicial Department, are reported at 24 A.D. 2d 628. The administrative decision of Appellee, Board of Education, is unreported. Copies of these opinions are set forth in the Appendix, *infra*, pp. 1, 7, 12.

Jurisdiction

On November 12, 1963, the Board of Education found the appellant guilty of "conduct unbecoming a teacher" and "insubordination" under Section 3012 of the Education Law of the State of New York for writing and circulating a letter to the Board as president of a teachers' union criticizing the action of the Board in not retaining another school teacher and criticizing in general the Board's tenure policy. The Board suspended appellant for seven and one-half months without pay and ordered him to cease and desist from repeating the acts which led to the suspension on pain of dismissal.

This determination was affirmed by the Appellate Division, Second Judicial Department, on July 19, 1965, Mr. Justice Rabin dissenting.

The New York Court of Appeals on November 29, 1966, affirmed by a vote of 4-3, without opinion, the order of the Appellate Division. The three dissenting judges, including the present Chief Judge, voted to reverse and to annul the determination upon the dissenting opinion rendered in the Appellate Division.

Thereafter a motion by the appellant for reargument or in the alternative to amend the remittitur to reflect that a question under the Constitution of the United States

was presented and necessarily passed upon, was decided by the Court of Appeals on April 11, 1967 by the denial of reargument and the granting of the requested amendment of the remittitur. A copy of this Order is set forth in Appendix, *infra*, pp. App. 5-6.

Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of New York, County of Nassau, the court possessed of the record, on July 7, 1967.

Jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U.S.C. § 1257(2). The following decisions are believed to sustain jurisdiction: *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York*, 360 U.S. 684 (1959).

Statute Involved

Section 3012 of the Education Law of the State of New York, subdivisions 1 and 2:

> "1. Teachers, principals, supervisors and all other members of the teaching and supervising staff shall be appointed by the board of education of a union free school district having a population of more than forty-five hundred inhabitants and employing a superintendent of schools, upon the recommendation of such superintendent of schools, for a probationary period of three years. The service of a person appointed to any of such positions may be discontinued at any time during such probationary period, on the recommendation of the superintendent of schools, by a majority vote of the board of education.
>
> 2. At the expiration of the probationary term of a person appointed for such term, subject to the conditions of this section, the superintendent of schools shall make a written report to the board of education recommending for appointment on tenure

those persons who have been found competent, efficient and satisfactory. Such persons, and all others employed in the teaching, examining or supervising service of the schools of such union free school district, who have served the probationary period as provided in this section, shall hold their respective positions during good behavior and efficient and competent service, and shall not be removed except for any of the following causes: (a) insubordination, immoral character or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty. Each person who is not to be recommended for appointment on tenure, shall be so notified by the superintendent of schools in writing not later than sixty days immediately preceding the expiration of his probationary period."

Question Presented

Appellant, the president of a teachers' union, who was himself a qualified teacher with tenure in the public school system, wrote a letter on behalf of his Union to the Board of Education which was highly critical of the Board's denial of tenure to a certain teacher and of the Board's tenure policy generally. Copies of the letter went to the administrative staff and faculty but no outsiders. After charges and hearing before the Board, appellant was found guilty and punished by suspension without pay and an order to cease and desist in the future on pain of dismissal, for having engaged in "conduct unbecoming a teacher" and "insubordination" under New York State Education Law, Section 3012. The charges did not allege malice, and while there was a Board finding of malice, it did not conform to this Court's standard that the utterance be false and made with knowledge of its falsity or in reckless disregard of whether it be false or true. The question presented is whether the statute as thus applied improperly deprives appellant (a) as a public school teacher,

and (b) in his representative capacity as president of the Union, of fundamental rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Statement of the Case

Appellant is a high school teacher on tenure at the Bethpage Senior High School (A-38, A-39),* Union Free School District No. 21, Bethpage, New York, and the appellee is the Board of Education of the said school district.

Appellant holds a permanent teaching certification issued by the Department of Education in the State of New York in English and all sciences and has taught for more than ten years in Union Free School District No. 21. It is conceded that Mr. Puentes is highly regarded as a superior teacher as is evidenced by the fact that he was in charge of advanced placement chemistry students (A-54, A-162).

Mr. Puentes was and is the President of the Bethpage Federation of Teachers (A-132), an organization of teachers in the Bethpage school system. This labor organization is a local of the American Federation of Teachers, AFL-CIO.

Teachers acquire tenure after a specified number of years of satisfactory teaching and the absence of objective criteria in selecting teachers for tenure adversely affects the morale of teachers to the detriment of the educational system.

This has been a continuing problem in the Bethpage school system and led to a study by the National Educa-

* The symbol "A" refers to the pagination contained in the appendix to Petitioner-Appellant's brief to the New York Court of Appeals which is part of the certified record herein.

tion Association of the system in 1958. There was a follow-up of the said investigation by the National Education Association Commission on Professional Rights and Responsibilities, which resulted in a report entitled "Bethpage Revisited" (Superintendent's Exhibit No. 4). At pages 4 and 5 of the said report, the following appears:

> "The evaluation records of teachers' services and denial of tenure to probationary teachers were important factors in the disturbances existing at the time of the 1956 investigation."

Although this report in reviewing conditions in Bethpage in the school year 1962-3 indicates that the conditions were corrected, the teachers themselves were not satisfied that such was the case, and the Federation's letter, which constituted the sole basis for the charges against Mr. Puentes, made numerous references to this problem of proper and objective evaluation of teachers and particularly the evaluation of one Miss Helen Coelho.

Miss Coelho, a native of India, who had taught in that country and in England, had been hired to teach in the Bethpage school system. After having taught the third grade for two years she was notified that she would not be rehired. The faculty was disturbed by this in that her pupils had shown superior accomplishment, parents had expressed enthusiasm about the results obtained by her pupils and her records appeared to show above average performance.

The Federation was asked to interest itself in her cause (A-61, A-121) and after investigating the situation (A-122, A-123, A-124), it decided to intervene on her behalf even though Miss Coelho was not a member of the organization. The Federation over the signature of Mr. Puentes as President, sent the following letter to appellee on June 18, 1963, addressed to Board member Lee Hilton:

(Letterhead of Bethpage Federation of Teachers, Local 1379, Union Free School District #21, Bethpage, New York.)

"Dear Mr. Hilton:

Although good tactics demand that a person "lead from strength,' we are writing this letter and leading from weakness in the interest of justice to an individual teacher and educational welfare of the children of Bethpage. This letter expresses the strong sentiments of all our members and still more Bethpage teachers who are not members.

We recognize the weakness in the position of a probationary teacher who can be dismissed at whim, but we wonder whether Bethpage can afford to lose the services of a teacher of demonstrated competence and, at the same time, increase the skepticism of a faculty whose respect for the procedures of the district is already dangerously low, as any honest attempt to determine the true level of teacher morale would reveal.

We refer to the issue involving Miss Helen Coelho, third grade teacher at the Pine Avenue School, who has not been requested to return to the district in September. If there were any doubt about her professional qualifications, we would defer to the administrative decision and this letter would not be written. But we are convinced that her departure from the district is due to personal considerations and that she is the victim of her supervisor's whim or a questionable administrative practice. Certainly, her professional record speaks for itself.

Item: Iowa tests show her third grade achieving at the fifth grade level, the highest results of any third grade class at Pine Avenue. Last year, she similarly achieved the highest results of any third grade class, although she taught 'low track' students.

Item: Her observation reports are replete with specific praise for her cooperation, dependability, desire, attention to individuals, conscientiousnesss, interest in children, sincerity, devotion of extra time, understanding, encouragement, and other qualities which, one would think, might make her a

teacher well worth keeping in this district, unless other, political considerations outweigh these factors in the minds of district administrators.

Item: The fact that she has come to us from a rich culture of another national tradition adds depth and perspective to the faculty at large, as well as the faculty of her own school.

Item: The parents of her students have expressed overwhelming delight for what Miss Coelho has done for and with their children.

Item: Miss Coelho commands the respect of her colleagues to such an extent that some who are reluctant to enter any controversy have taken positive action in her behalf. Also, she was professionally recognized as the guest speaker before the Bethpage Teachers Association.

Item: The Superintendent of Schools has conceded that Miss Coelho's relations with the school staff have been excellent, that parents of her pupils have expressed enthusiasm and approval of her efforts, and the children are undoubtedly absorbing the subjects presented.

Item: She is a teacher with unique experiences, having taught in India and England before entering education in Bethpage.

Item: Another elementary school principal has expressed a willingness to accept her as a faculty transfer.

Now, suddenly, it has been discovered by her principal that Miss Coelho is unable to 'stimulate her pupils,' certainly a shabby excuse in the light of all the contrary evidence, and especially when it is common knowledge that the predicament of Miss Coelho is basically another instance of competency being subordinated to the 'divine rights' of administration. Can we wonder why education is languishing when its values are so distorted and when, for contemptible political reasons, a glaring wrong cannot be rectified.

So great is the desire for personal justification that Miss Coelho is not to be permitted to transfer to the faculty of a principal who would welcome her. Rather, her fate is to be hounded out of the district.

Although the community has been mollified by the questionable NEA re-evaluation, the truth is that the majority of your faculty rejects their report. Deny this as you wish, it remains the fact. And when the NEA report claims that 'Board policies have now been established for evaluation and review of a probationary teacher's services,'' the matter of Miss Coelho must expose the hypocrisy of this report to even the newest and most timid member of your staff.

We trust that you will not dismiss this letter as another activity of 'trouble-makers,' by which you conceal the very real problems that exist in Bethpage, the NEA report to the contrary notwithstanding. But, in any event, we dare to hope that some of you may really wonder if all is indeed as well as you have been told.

We dare to hope that a searching and thoroughly objective look into the matter of Miss Coelho will reveal even to you some of the basic problems of the district, the elimination of which will mark the beginning of real education for Bethpage, without the need for sham, jargon, or juggled statistics.

Yours truly,

Robert Puentes, President
Bethpage Federation of
Teachers.''

The distribution of copies of this letter was authorized by the Federation (A-40, A-41) and was confined to the administrative staff and faculty. No copies were distributed to outsiders such as the public, parents, pupils or the press. The distribution by the appellant was done in his capacity as President of the Federation and not as a personal act (A-44).

Shortly thereafter charges were filed against Mr. Puentes under Section 3012 of the Education Law. All of these charges, with the exception of one which was dropped on the Superintendent's own motion, concerned themselves with the foregoing letter or grew out of the writing of the letter (A-162).

Subsequently, appellee issued a decision (Appendix, *infra*, pp. App. 12-42) finding the appellant guilty. The appellant was suspended without pay for over seven months and put on notice that "such similar activity and each of them if they occur will be treated as dismissal offenses by this Board of Education" (Appendix, *infra*, p. App. 41).

In its decision the appellee rejected appellant's contentions that the statements in his letter were protected under the free speech guarantees of the federal and state constitutions (*infra*, p. App. 36). It held that the letter was written with "malice" in that "the language used therein is unnecessarily vitriolic" and also evinced a "generalized malice" (*infra*, p. App. 32).

The Appellate Division by decision and order dated July 19, 1965 confirmed the determination of the appellee with one Justice dissenting on the ground that the letter did not "exceed the bounds of fair comment and criticism on a subject relating to a matter of public interest and concern" (*infra*, p. App. 10). His opinion then went on to cite the cases of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); and *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), as controlling. However, the majority, citing the now overruled case of *Adler* v. *Board of Education*, 342 U.S. 485 (1952), rejected appellant's contention that Section 3012 of the Education Law was unconstitutional as applied. The court went on to hold that a public employee's freedom of expression is "subject to the proviso that he shall not impair the administration of the services in which he is engaged . . ."; characterized the letter in question as "intemperate"; and concluded that "it would tend to impair the administration of the school district's services" (*infra*, pp. App. 8-9). No mention was made by the majority, and thus no discussion was had, of the relevance of the *Times* doctrine to public employees in general and school teachers in particular. Also, the fact that appellant was

writing the letter in his representative capacity as union president was totally ignored by the majority.

The New York Court of Appeals on November 29, 1966 affirmed the judgment of the Appellate Division by a vote of 4 to 3, the majority filing no opinion. The dissenting judges (including present Chief Judge Fuld) voted to reverse on the basis of the dissenting opinion rendered in the Appellate Division.

On April 11, 1967 the Court of Appeals denied reargument but amended its remittitur to show that a constitutional question was raised and necessarily passed upon.

A notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of New York, County of Nassau, the court possessed of the record, on July 7, 1967.

The Questions Are Substantial

1. There has been an enormous upsurge in public employment in the United States since World War II which trend in all likelihood will continue.* Concurrently, there has been a tremendous growth of unionization of public employees which has been furthered by President Kennedy's Exec. Order 10988 and various state enactments.**

The right of public employees to speak out on matters of public concern including the terms and conditions of their own employment is plainly a matter of great moment and currency. Cases are arising all over the country where the right of public employees to speak without jeopardizing their job tenure is involved.

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* *cf. Bagley* v. *Washington Township Hospital District*, 55 Cal. Rptr. 401 at 409, 421 P. 2d 409 at 417.

** For example, the recently enacted New York "Taylor Law" (Public Employees' Fair Employment Act, McKinney's Session Law News, Ch. 393, May 10, 1967).

Two such cases have now been filed in this Court. *Pickering* v. *Board of Education*, No. 510, October Term, 1967; and *Watts* v. *Seward School Board*, No. 320, October Term, 1967. The instant case likewise presents the free speech issue raised by these two cases. In addition, it presents the free association issue of the right of public employees to band together in a union and speak out collectively in order to protect their mutual interest.

Thus there is here presented both the question of the right of an individual teacher to criticize his employers who are themselves elected public officials, and the right of public employees to act through their union to speak out on matters of legitimate concern to the group, without risking or suffering disciplinary action.

The ruling by a bare majority of the New York Court of Appeals, affirming Board of Education punishment of a teacher for writing a letter on behalf of his Union to the Board, can effectively emasculate the functioning of a public employees union, vitiate the role of teachers in striving to improve the quality of the educational system of which they are the most crucial segment and formally relegate the public employee to "second class citizenship." For these reasons alone, it is time now for the United States Constitution to apply in all its majesty so as to protect public employees as it does the rest of the citizenry. A declaration that public employees, whether as individuals or in their collective capacity, may exercise their First Amendment rights is long past due.

2. That the letter in question here, the authorship of which represents the sole transgression of the appellant, discussed a matter of public importance—the methods employed by a Board of Education in selecting and retaining school teachers—can not be gainsaid.

It is now crystal clear that such a letter embodying criticism of a public official, relating to his official con-

duct, written by someone other than a public employee, would be constitutionally protected unless it could be faulted as having been knowingly or recklessly false. *New York Times Co.* v. *Sullivan, supra; Garrison* v. *Louisiana, supra; Dombrowski* v. *Pfister,* 380 U.S. 479 (1965); *Rosenblatt* v. *Baer,* 383 U.S. 75 (1966). Recently this doctrine was extended to the criticism of "public figures" as well. *Curtis Publishing Co.* v. *Butts* and *The Associated Press* v. *Walker,* 388 U.S. 130 (1967). Very sound fundamental reasons support this right to criticize public officials in the execution of their public trust, and there seems to be no reason in the nature of public employment why *New York Times* v. *Sullivan, supra, should* not be deemed to state the limits a public employee may go towards criticizing supervisory officials without loss of First Amendment protection. Accord, *Swaaley* v. *United States,* 376 F. 2d 857 (U.S. Ct. Cl. May 12, 1967). The notion that this doctrine applies only to the citizen-critic of his government was heard and rejected in *Bond* v. *Floyd,* 385 U.S. 116 (1966), where this Court held the principle of *Times* applicable to statements of a State legislator criticizing public policy and the implementation thereof. "We think the rationale of the New York Times case disposes of the claim that Bond's statements fell outside the range of constitutional protection." *Bond* v. *Floyd, supra,* at 136.

The operating premise of the majorities below apparently is that the appellant has no right to public employment, hence his exercise of constitutionally protected free speech is undertaken at the risk of suspension from employment, or worse, dismissal. This approach may be traced to Mr. Justice Holmes, who while sitting as Chief Justice of Massachusetts seventy-five years ago held:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *Mayor, Etc., of City of East Bedford,* 155 Mass. 216, 220, 29 N.E. 517 (1892).

Fortunately, this notion that merely by becoming a public employee an instant transmutation took place whereby the public employee, formerly a citizen, no longer was entitled to a full measure of constitutional protection, has been thoroughly discredited. *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Garrity* v. *State of New Jersey*, 385 U.S. 493 (1967). Reversals in the instant case and in the contemporary appeals to this Court from *Pickering* v. *Board of Education*, 36 Ill. 2d 568, 225 N.W. 2d 1 (1967) and *Watts* v. *Seward School Board*, 421 P. 2d 586 (Alas. Sup. Ct., 1966) will complete and nail down the patent right of public employees to speak out on matters of public interest especially those relating to their own bailiwick.

The decision herein appealed from cannot be reconciled with the decision of this Court when it said:

> "But constitutional doctrine which has emerged since that decision [referring to *Adler* v. *Board of Education*, 342 U.S. 485 (1952)] has rejected its major premise. That premise was that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. . . . 'the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'" *Keyishian* v. *Board of Education, supra* at 605-606.

or when this Court said:

> "We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity* v. *State of New Jersey, supra* at 500.

While these principles have only recently been stated so explicitly and compellingly, they are neither new nor novel and prior decisions could well have supported a different result below. See, for example, *Wieman* v. *Updegraff*, 344

U.S. 183 (1952); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); *Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1956); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964): *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Speiser* v. *Randall*, 357 U.S. 513 (1958).

Moreover, school teachers, above all, must be accorded freedom of thought and expression.

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' *Shelton* v. *Tucker, supra,* 364 U.S., at 487, 81 S. Ct., at 251. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' *United States* v. *Associated Press, D.C.*, 52 F. Supp. 362, 372." *Keyishian* v. *Board of Regents; supra,* at 603.

Consonant with the necessity of granting school teachers full freedom of speech, which is eloquently yet simply described in the foregoing passage, is the correlative duty of teachers to speak out on matters of public education.

Mr. Justice Rabin, dissenting in the Appellate Division, correctly observed that the letter "reflected nothing more than an expression of the petitioner's opinion concerning a matter upon which he was particularly qualified to speak and as to which he clearly had the right—*if not the obligation*—to voice an opinion, not only individually but in his representative capacity" (Appendix, *infra* p. App. 10). (Emphasis supplied). It was more than coincidence that

this very same notion was reflected in the dissenting opinion of Mr. Justice Schaefer in the *Pickering* case:

> "Teachers are not necessarily the best critics in matters of school finance and administration, but they are in closer contact with the actual operation of the schools than anyone else, and the public should not be deprived of their views." *Pickering* v. *Board of Education,* 36 Ill. 2d 568 at 584.

If this much is established, i.e., that school teachers should and must be protected by the First and Fourteenth Amendments' guarantees of freedom of expression, then inquiry must be made as to how, and if, the constitutional tests consistent with these constitutional guarantees were met in the instant case. Clearly, the rationale of the Supreme Court's rulings in the *Times* case and its brethren requires that discipline, damages, or any repercussion whatsoever stemming from the exercise of criticism of public officials must be preceded by a positive finding that the criticism contains statements that were either knowingly or recklessly false. In capsule, "malice", with the meaning precisely that "the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true" (*Garrison* v. *Louisiana,* 379 U.S. 64, 74), must be found.

This "actual malice" test was never applied by the appellee or by the court on review. Concededly, the appellee found what it considered malice in concluding that whatever qualified privilege appellant possessed as a union president was destroyed by "malice." Its brief discussion is illuminating and worthy of reprint:

> "Even if such privilege existed it would be destroyed by malice. We find that the letter of Puentes dated June 18, 1963 indicates malice in that the language used therein is unnecessarily vitriolic for any legitimate purpose such letter could have.

> Furthermore, while purportedly a letter written in aid and concerning Helen Coelho, the letter goes on to attack both the NEA and the Board of Education in a manner wholely unrelated to the Coelho incident thus disclosing a generalized malice" (*infra*, p. App. 32).

A finding that language was "unnecessarily vitriolic for any legitimate purpose" not only does not satisfy this Court's malice test above described, but also is in direct contradiction to the fundamental premise of the *Times* case, namely, that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times* v. *Sullivan, supra*, at 270. Further, the appellee's finding that the letter disclosed "a generalized malice" because the appellee considered some of its contents not germane to what it considered the thrust of the letter must be characterized at best as an *ipse dixit*.

Yet, this erroneous conception of malice, as found by the appellee, was not discussed by the Appellate Division in affirming appellant's discipline, apparently because that court did not feel constitutional rights were violated in this punishment of a public employee. The Court of Appeals, however, on the occasion of amending the remittitur to reflect the necessity of its having ruled on the constitutional question, held that the appellee's finding that the letter was "malicious . . . was supported by substantial evidence." It appears therefore that the highest court of New York has indeed applied the Constitution to the case at bar but misapplied the constitutional test.

This far-reaching error requires correction by this Court.

3. This case involves more than the chilling effect of appellee's actions on the free speech rights of an individual teacher. A further aspect of great constitutional significance is presented, namely, the free association right of a group of workers, banded together in a union, to advocate and further their collective interests.

It is well settled and should need no further argument that members of a union may, without special statutory authorization by a state, make known the facts of a labor dispute as a right of free communication guaranteed by the First and Fourteenth Amendments of the Federal Constitution. *Senn* v. *Tile Layers Protective Union,* 301 U.S. 468 (1937); *AFL* v. *Swing,* 312 U.S. 321 (1941). So important are these rights of an employee or his labor representative to speak that, absent a clear and present danger of the gravest evil, the state not only is without power to impose a blanket prohibition on their exercise, *Thornhill* v. *Alabama,* 310 U.S. 88 (1940), but also may not place any significant obstacle in their path, *Thomas* v. *Collins,* 323 U.S. 516 (1945). As this Court stated in *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 430 (1963), "there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity," and the dissent agreed that freedom of expression "includes * * * his right to advocate and his right to join with his fellows in an effort to make that advocacy effective" (*id.* at 452).

When the Supreme Court declared that "the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer . . . is a fundamental right," *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 33 (1937), it made no exception for public employees. The Court's recognition of this right to self organization and representation was based on considerations which are as characteristic of public as of private employment: that a single employee is helpless in dealing with an employer; that he is dependent ordinarily on his daily wage for the maintenance of himself and family and therefore is unable to leave the employ to resist arbitrary and unfair treatment; that a union is essential to give employees opportunity to deal on an equality with their employer.

Thus, the Court has given, time and again, full recognition to the legality of collective action on the part of employees in order to safeguard their proper interests. And at a minimum, collective action includes the right to express the views, needs and desires of the union members. In *Cafeteria Employees Union, Local 302* v. *Angelos*, 320 U.S. 293, 296 (1943), it was tersely expressed: "... a state cannot exclude working men in a particular industry from putting their case to the public in a peaceful way ..."

It is in this context that the disciplinary action taken by appellee must be viewed. For the appellant was writing the letter not merely as an individual, whose rights have generous scope in any event, but in his representative capacity as well—as the chief officer of the Bethpage Federation of Teachers. Thus, it may be said that the inhibitory effect of the appellee's action is much greater in breadth and scope than it may seem at first blush and consequently far more damaging to freedoms that are all too delicate and vulnerable, as well as precious, to begin with. For it cannot be disputed that any interference with the freedom of a labor organization is simultaneously an interference with the freedom of all its members.

CONCLUSION

For the reasons stated, appellant respectfully submits that this case presents substantial federal questions of the scope of First and Fourteenth Amendments protection of a public employee/union president criticism of elected public officials who also happen to be his employer. Consideration and resolution of these questions warrant that probable jurisdiction should be noted.

Respectfully submitted,

ERNEST FLEISCHMAN,
Attorney for Appellant,
120 East 41st Street,
New York, New York 10017.

DELSON & GORDON,
STEPHEN F. GORDON,
of Counsel.

APPENDIX

Opinion of New York State Court of Appeals

Application of ROBERT PUENTES,

Appellant,

v.

THE BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 21 OF TOWN OF BETHPAGE, NASSAU COUNTY, NEW YORK,

Respondent,

for a Review, etc.

Order affirmed, without costs.

All concur except FULD, VAN VOORHIS and BERGAN, *JJ.*, who dissent and vote to reverse and to annul the determination upon the dissenting opinion at the Appellate Division.

Remittitur of New York State Court of Appeals

No. 252

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th day of November in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

Witness,

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur November 29, 1966.

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2. No. 252 66

In the Matter of the Application of
ROBERT PUENTES,

Appellant,

vs.

THE BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 21, TOWN OF BETHPAGE, NASSAU COUNTY, NEW YORK,

Respondent.

for a Review &c.

BE IT REMEMBERED, That on the 21st day of May in the year of our Lord one thousand nine hundred and sixty-six, Robert Puentes, the appellant in this cause, came here

unto the Court of Appeals, by Delson & Gordon, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The Board of Education of Union Free School District No. 21, Town of Bethpage, Nassau County, New York, the respondent in said cause, afterwards appeared in said Court of Appeals by Louis N. Orfan, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Ernest Fleischman, of counsel for the appellant, and by Mr. Leo F. McGinity, of counsel for the respondent—brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the

Remittitur of New York State Court of Appeals

form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York.

Court of Appeals, Clerk's Office,
Albany, November 29, 1966.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

[SEAL]

App. 5

Order of New York State Court of Appeals Amending Remittitur

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eleventh day of April A.D. 1967.

Present:

HON. STANLEY H. FULD,
Chief Judge, presiding.

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1 Mo. No. 237

In the Matter of

the Application of ROBERT PUENTES,
Appellant,

vs.

THE BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 21, Town of Beth-Page, Nassau County, New York,
Respondent.

A motion for reargument or, in the alternative, to amend the remittitur in the above cause to this Court having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted,

Order of New York State Court of Appeals Amending Remittitur

the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> A question under the Constitution of the United States was presented and necessarily passed upon, viz.: Appellant contended that, though section 3012 of the Education Law was not unconstitutional on its face, it was unconstitutional to the extent that it authorized the board to penalize him for insubordination and acts unbecoming a teacher when the act on which the punishment was predicated was the dissemination of a letter which the appellant contended was constitutionally protected. The Court of Appeals held that the finding of the local school board that the letter was defamatory, malicious and false and that it was designed to create suspicion, dissension and disharmony among the board, the administration and faculty of the school district, was supported by substantial evidence and that the appellant's constitutional rights were not violated.

And the Supreme Court of Nassau County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Gearon Kimball,
Deputy Clerk.

(seal)

Majority Opinion of Appellate Division, Second Department

12. In the Matter of Robert Puentes, Petitioner v. Board of Education of Union Free School District No. 21 of Town of Bethpage, Respondent.—Proceeding pursuant to article 78 of the CPLR, to review and annul the determination of the respondent Board of Education, made November 12, 1963, after a public hearing on written charges under section 3012 of the Education Law, which: (1) suspended petitioner from his position of teacher in the Bethpage Senior High School from the date of the determination until the end of the then current school year, June 30, 1964; and (2) directed petitioner to cease and desist from activities similar to those complained of in the charges, with notice that a recurrence of such activities will be treated as offenses warranting dismissal. By order of the Supreme Court, Nassau County, entered December 7, 1964 pursuant to statute (CPLR 7804, subd. [g]), the proceeding has been transferred to this court for disposition. Determination confirmed, with costs. The charges against petitioner were (1) conduct unbecoming a teacher and (2) insubordination. The specifications under the first charge were: (a) that petitioner authored a certain letter dated June 18, 1963 addressed to the respondent board, with respect to the subject of a certain probationary teacher not being re-engaged for the next school year, and caused the letter to be sent to the board and copies to be circulated to members of the administrative and teaching staffs within the school district; (b) that the letter defamed the administration of the school district as to professional matters, particularly the principal of the school in which the probationary teacher was serving; (c) that the probationary teacher did not consent to the circulation of the letter; and (d) that the circulation of the letter could endanger the probationary teacher's

professional standing and advancement. Petitioner's signature on the letter was under the designation of president of a certain organization of teachers. The specifications under the second charge were the same as those of the first, plus the claim that on June 21, 1963 the petitioner refused to answer questions put to him by the Superintendent of the school district concerning his activities in connection with the letter. Petitioner informed the Superintendent that he wanted to consult with counsel before answering the questions and he also claimed the right to refuse to answer them on the ground that they related to union activities. In our opinion, all the findings and conclusions of the board have substantial support in the record. However, we do not pass on the findings as to the issues with respect to the specifications designated (c) and (d) under the first charge, including the findings that the testimony of the witnesses, Mrs. Vredenburgh and Mr. Martin, was unworthy of belief. It is not necessary for us to pass on those findings in order to reach our decision. Although a public employee may, with impunity, express himself freely in general, such expression is subject to the proviso that he shall not impair the administration of the services in which he is engaged, thereby impairing his own usefulness and fitness to carry on his duties (*Matter of Sausbier* v. *Wheeler*, 276 N. Y. 246; *Matter of Kern* v. *La Guardia*, 284 App. Div. 627, affd. 289 N. Y. 776; *Jepsen* v. *Board of Educ.*, 19 Ill. App. 2d 204). This limitation applies particularly to a school teacher, for he "works in a sensitive area in a schoolroom" and the authorities "must preserve the integrity of the schools" (*Adler* v. *Board of Educ.*, 342 U. S. 485, 493; see, also, *Beilan* v. *Board of Educ.*, 357 U. S. 399, 405; cf. *Matter of Cohen*, 9 A D 2d 436, affd. 7 N Y 2d 488 [remittitur amd. 8 N Y 2d 754], affd. *sub nom. Cohen* v. *Hurley*, 366 U. S. 117, mot. for lv. to petition for rehearing den. 374 U. S. 857). Petitioner's letter was not merely a

plea or protest with respect to whether Miss Coelho's merits as a teacher had been misjudged. It was not sent solely to the specific official or officials who had jurisdiction to act on the subject of whether Miss Coelho ought to be re-engaged. The letter included an intemperate and condemnatory attack upon the school authorities; it was clearly designed to embarrass them; and it would tend to impair the administration of the school district's services. While the letter was addressed to the board, copies of the letter were also sent to members of administrative and teaching staffs within the school district. Among other things, the letter stated that the faculty had a "dangerously low" respect for the district's procedures; that "personal considerations", the "whim" of Miss Coelho's principal and "political considerations" dictated the decision not to re-engage Miss Coelho; that the principal had resorted to "a shabby excuse" to support the said decision; and that the school administration was generally guilty of deeming its rights to be "divine," of "hypocrisy," and of using "sham, jargon, or juggled statistics." It is clear that Miss Coelho's plight was capitalized as affording an opportune occasion for this attack upon the school officials. Ughetta, Acting P. J., Christ, Brennan and Hopkins, J.J., concur;

Dissenting Opinion of Rabin, *J.*

Rabin, J., dissents and votes to annul the board's determination, with the following memorandum: In my opinion, under the circumstances here, the charges of conduct unbecoming a teacher and insubordination, emanating from the letter of June 18, 1963, which was circulated over petitioner's signature as president of the Bethpage Federation of Teachers-Local 1379, do not constitute sufficient legal ground for the disciplinary action taken against petitioner. I recognize that situations may arise where the nature of

the criticism of a superior may be such as to constitute insubordination or conduct unbecoming the employee. However, in each case we must balance the need for proper discipline with the overriding principle of freedom of expression which has so recently been given greater protection by the highest courts of the land. When viewed as a whole, the letter in question clearly was only a vigorous protest against the actions, the policies and practices of the local board of education, even though the letter was interspersed with several intemperate or improvident remarks. In sum and substance, it reflected nothing more than an expression of the petitioner's opinion concerning a matter upon which he was particularly qualified to speak and as to which he clearly had the right—if not the obligation—to voice an opinion, not only individually but in his representative capacity. It is my view that, *when read in context*, all the statements therein contained do not exceed the bounds of fair comment and criticism on a subject relating to a matter of public interest and concern (cf. *Matter of Gersh* v. *Village of Tuckahoe*, 23 A. D. 2d 258). Discussion "on public issues should be uninhibited, robust, and wide-open, and * * * may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials" (*New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270; *Garrison* v. *Louisiana*, 379 U. S. 64). The policy and practices of a local board of education are obviously public issues of the greatest concern in the local community. That a public employee may express himself freely so long as he does not impair the administration of the service in which he is engaged, is clear. Legislative recognition has been given to such employee's right "to the expression or communication of a view, grievance, complaint or opinion on any matter relating to the conditions or compensation of public employment or their better-

ment, so long as the same is not designed and does not interfere with the full, faithful and proper performance of the duties of employment" (Civil Service Law, § 108). I find nothing in petitioner's conduct or statements which would impair or adversely affect either the administration of the public service in which he was engaged or the proper performance of the duties of his employment. As to the claim that petitioner was further insubordinate in wrongly refusing to answer questions put to him during his interrogation by the School Superintendent: Such refusal was a qualified refusal; petitioner said he would not answer unless he had the advice of counsel. In the limited appendix method utilized in presenting the proceeding in this court, I find no ruling on the part of the School Superintendent to grant or deny such request for an opportunity to first consult with counsel. Consequently, in my opinion, this claim is incapable of present judicial review and should form no part of the decision herein.

Decision of Board of Education

CHARLES H. BRYAN, Superintendent of Schools.

UNION FREE SCHOOL DISTRICT #21

against

ROBERT PUENTES,

Respondent.

STATEMENT

This is a proceeding, under Section 3012 of the Education Law, to remove Robert Puentes (hereinafter referred to as Puentes), a High School teacher enjoying the benefits of tenure, on charges brought by Charles H. Bryan (hereafter referred to as Bryan), Superintendent of Schools of District #21.

The Board of Education held hearings on September 21st, 1963, October 2nd, 1963, October 3rd, 1963, October 19th, 1963, October 22nd, 1963, October 23rd, 1963, October 29th, 1963, November 6th, 1963 and November 7th, 1963, at all of which Petitioner and Respondent were represented by Counsel and 1186 pages of testimony were adduced.

Superintendent Bryan was represented at all of these hearings by Louis Orfan, Esq. and Alex Rosenthal, Esq.

Respondent Puentes was represented at all of these hearings by Ernest Fleischman, Esq.

ISSUES:

A. CONDENSATION OF CHARGES:

After preliminary amendments by consent, the charges preferred against Puentes were as follows:

Decision of Board of Education

I. *Conduct Unbecoming a Teacher* pursuant to Section 3012 Education Law.

The gravamen of this charge is that Puentes, by authoring, publishing, or causing to be published, circulating or causing to be circulated among the Faculty, the Board of Education and Administrators, a certain letter dated June 18, 1963 and mimeographed copy thereof, was guilty of conduct unbecoming a teacher, in that said letters were calculated to create suspicion, dissension and disharmony among said people, and to hold the Administration of this District and the Principal of the Pine Avenue School up to contempt and ridicule and attack the professional integrity of the aforesaid Administrators in the course of their appointed duties. This charge also includes a charge that aforesaid letters were circulated without the consent of one Helen Coelho, and contained information relating to her professional status as a teacher, which could endanger her professional standing and advancement.

Section 3012 sets forth Conduct Unbecoming a Teacher as one of the grounds for dismissal of a teacher enjoying the benefits of Tenure. While specific acts or behavior which can constitute such conduct are not set forth in the Statute, the Board of Education is satisfied that if Charge I is established, this would be grounds for dismissal within the meaning of the aforesaid Statute.

It must, therefore, necessarily follow that if Superintendent's Charge I is true, then Robert Puentes committed acts which are inimical to the purposes and functioning of a good educational system, would specifically tend to be injurious to this district, and would therefore constitute Conduct Unbecoming a Teacher.

II. *Insubordination* against the Administration and the Board of Education of Bethpage, in that he authored and

circulated the aforesaid letter dated June 18, 1963 and a mimeographed copy thereof.

IIA. *Insubordination* in that he refused on direction from the Superintendent to answer questions put to him regarding his activities in connection with Exhibit A and B herein and his activities during periods when he was on duty as a teacher in the District.

B. General Denial and Affirmative Defenses:

Robert Puentes, in response to the detailed charges, made a general denial of wrongdoing and left his defenses to be ascertained from the evidence and verbal presentation of legal defenses made by his Counsel during the hearing. In the absence of specific Statutory authority, and in face of the refusal of his Counsel to provide anything more specific (see page 22, ll. 13-17), the Board of Education felt compelled to permit the respondent to proceed in this manner. In direct consequence of the Board's inability to obtain framed issues, and the desire of the Board to permit the respondent every possible latitude without inadvertently precluding any valid defense, the presiding chairman continuously permitted issues to be introduced and testimony to be adduced, the materiality of which could not be readily ascertained. As a consequence thereof, the testimony in this proceeding ran in excess of 1100 pages not including summations.

Based on an analysis of the record, the Board of Education finds, that apart from the right of the respondent to expect that the complainant establish his charges, the following defenses were made in Puentes' behalf to Charge I.

1. Truth as a defense based on apparent reference to the laws applicable to defamation.

2. Legal Privilege in making statements complained of in the letter of June 18, 1963, based on the

contention that Puentes signed the letter of June 18, 1963 as an officer of the Bethpage Federation of Teachers Local 1379 AFL-CIO.

3. Constitutional defenses: Art. 1 Section 8 and Article 1 Section 17 of the Constitution of the State of New York.

4. Section 108 Subsection I of the Civil Service Law of the State of New York.

FINDINGS OF FACT AS TO CHARGE I

Turning our attention to the evidence introduced during this proceeding, which bears on the establishment of Charge I, we find as follows:

Puentes did in fact author, publish or cause to be published, circulate or cause to be circulated the letter dated June 18, 1963 bearing his name as signatory and the mimeographed copy thereof annexed to the Charges as Exhibits A and B.

Puentes in his own testimony did admit the following facts relative to the original letter of June 18, 1963:

1. That he collected data for letter (p. 126 ll. 11-16).

2. That he supplied data for letter (p. 132 ll. 3-10).

3. Reviewed rough draft of letter before signing letter (p. 132 ll. 23-25).

4. Corrected rough draft before signing letter (p. 147 ll. 2-9).

5. Signed this letter (p. 126 ll. 20-25).

6. Admitted delivery to District Clerk on June 18, 1963 for transmission to Board of Education (p. 99 l. 23 to p. 100 l. 14).

Decision of Board of Education

Puentas, in addition, by his own testimony did admit the following facts relative to the mimeographed copy of his letter of June 18, 1963, that he:

1. Caused letter to be mimeographed (p. 103, l. 6 to p. 104, l. 11).

2. Received mimeographed copies in parking lot before distribution (p. 102, l. 14 to p. 103, l. 5).

3. Read mimeographed copy prior to distribution (p. 104, l. 17 to p. 105, l. 13).

4. Supervised distribution in High School and elsewhere (p. 107, l. 21 to p. 109, l. 24; p. 137, l. 4 to p. 138, l. 6).

5. Delivered to Assistant High School Principal Parlato with copies for High School Principal and other Assistant Principal (p. 134, ll. 13-4).

6. Sent through interschool mail to Pine Avenue School (p. 144, ll. 7-15).

7. Delivered to Bloomingdale School (p. 113, ll. 23-114, l. 5).

8. Made distribution in High School (p. 110, ll. 15-23; p. 137, l. 4 to p. 138, l. 6).

The Board further notes testimony from Superintendent Bryan on June 21, 1963 that the signature on the mimeographed copy of the June 18, 1963 letter was his (Puentes) (p. 163, l. 13 to p. 163, l. 17). Testimony from Puentes was to the contrary (p. 100, l. 24, to p. 101, l. 16). However, in light of the other admissions relative to authorizing and distributing this mimeographed copy, the question of who actually physically signed the mimeograph before reproduction appears unimportant to the Board of Education, since in any event the signature of his name

was obviously employed with his knowledge and consent and its use clearly ratified by said respondent.

With reference to that portion of Charge I which charges Puentes of acting wholly outside the scope of his assigned duties as a teacher in the District in authoring, publishing and circulating his letter of June 18, 1963:

The Board of Education finds:

That there can be no question that Puentes is not now and never has been assigned the duties of evaluating any elementary teacher, reviewing the actions of any school principal or the actions of the Superintendent of Schools in this District and, therefore, was acting wholly outside the scope of his assigned duties as a science teacher in the High School.

With reference to that portion of Charge I, wherein Puentes is charged with not receiving permission or consent of Helen Coelho, either express or implied, to circulate the aforesaid letters and in disseminating information affecting her professional status, he in fact committed acts which could endanger her professional standing and advancement as a teacher.

The Board of Education finds:

That he did not have her permission and that dissemination of such information as contained in Puentes' letter of June 18, 1963 could indeed prove injurious and detrimental to her professional standing and advancement as a teacher. In reaching this finding, that there was no consent from Helen Coelho, the Board takes note of the testimony of Superintendent Bryan in which he referred to a conversation had with Helen Coelho on June 25, 1963 in which she denied any connection with the aforesaid letter (p. 672, l. 1 through p. 673, l. 1). This testimony is substantiated by Superintendent's Exhibit #24 in evidence, a letter by Helen Coelho to Superintendent Bryan dated June 20, 1963. The only contrary evidence produced was introduced through the respondent's witness,

Mrs. William O. Vredenburgh. This witness, however, testified repeatedly that Helen Coelho had reviewed, corrected and approved the final draft of Robert Puentes' June 18th letter in her presence. And yet, the item purportedly corrected and inserted in the draft by Helen Coelho did not in fact appear in the letter of June 18, 1963 as finally admitted by the witness when confronted with the actual letter (p. 1007, l. 10, through p. 1008, l. 12 and p. 1021, l. 5, through p. 1034, l. 20). In view of the impeachment of this witness through the contradiction in her own testimony noted above and through the further impeachment testimony on an additional material point offered through Wanda Darling, a disinterested witness, (p. 1018, l. 20-p. 1020, l. 1 and p. 1067, l. 10 through p. 1069, l. 20) and further through the testimony of Mrs. Vredenburgh showing her to be not only an interested party but as revealed during cross-examination, a collaborator and accomplice of Robert Puentes as well in preparing his letter of June 18, 1963 (p. 1033, ll. 4-25) and other testimony by Mrs. Vredenburgh casting doubt on her ability to recollect and identify the draft as a true copy of the June 18th letter, the Board of Education rejected Mrs. Vredenburgh's testimony as unbelievable.

Association of Helen Coelho's name as the supposed beneficiary of the letter of June 18, 1963 with its vitriolic attacks on the Board of Education and the Administration as hereinafter set forth and revealing by widespread publication and distribution that there were issues as to her competence in the eyes of her superiors, whereas in fact, Helen Coelho had already resigned and been employed elsewhere (Exhibits 22, 23 and 25 and evidence and stipulation by Counsel p. 1127, l. 20 through p. 1128, l. 3) could well have an adverse affect on her professional status and advancement with another employer, either present or future, and no individual has the right to publish such information without consent of the affected party.

Decision of Board of Education

The Board finds that Principal Rockhill in evaluating teacher Helen Coelho over a a year and one-half period followed the policy and standards set forth in Faculty Manual (Exhibit 5) for evaluating a probationary teacher. The Board finds further that her policy in evaluation and observation was consistent upon examination of Exhibits 11 through 21 in evidence. These facts will be discussed in more detail under Defenses.

The Board finds that the Bethpage Federation of Teachers is a local union #1379 of the American Federation of Teachers. That the letter of June 18, 1963 was written on Bethpage Federation of Teachers Local 1379 stationery and that the Constitution of said organization requires one-third of the membership to constitute a quorum for a general or special meeting, and that 75% attendance of the Executive Committee is required for a quorum.

The Board further finds that at the meeting of the Executive Committee on or about June 12, 1963 a quorum was not present (Exhibit 29) (p. 912 testimony Valenti) these facts are discussed in detail under Defenses.

The Board of Education specifically considered the language complained of by the Superintendent in the letter of June 18, 1963 in the context in which it appeared and the usual and ordinary meaning which such words would normally convey to the average person. We find that this language would in fact have the effect of casting ridicule and abuse upon the Administrators clearly identifiable by reference, to wit: Charles H. Bryan, Superintendent of Schools, and Anna Rockhill, Principal of the Pine Avenue School, as the person responsible for making evaluations of Helen Coelho, and the Board of Education, and in fact, such language is calculated to create suspicion, dissension and disharmony among the Board, the Administration and the Faculty of the District.

The word "whim" in the ordinary sense denotes caprice and in the context used clearly indicates that the adminis-

trator referred to, Anna Rockhill, was actuated by personal considerations in the making of her evaluations rather than professional standards. The additional words "questionable administrative practices" appearing in the same paragraph with "whim" denote a departure from regular and accepted professional standards and would further denote to a reader that personal considerations or caprice were employed in evaluating Helen Coelho. This accuation by Puentes, constituted an unmistakable attack upon the integrity and competence of Anna Rockhill in the course of her legally assigned duties as Principal of the Pine Avenue School.

In two references, cited under Charge I, Puentes used the words "political considerations," and further "contemptible political reasons" in describing both the manner in which Helen Coelho was evaluated and in asserting the reason why such evaluations were not corrected or the situation arising therefrom was not rectified.

No reader could help but conclude from the language used that the meaning conveyed was that first the Principal was not professionally motivated in her action but that, in addition, the top administrator of the district, Superintendent Bryan identified by reference since he is the only administrator who could reverse Principal Rockhill, is accused of base, unworthy and unprofessional considerations both individually and in concert with Anna Rockhill in his failure to take remedial action. We find that this language in the context used constitutes the severest form of attack on the integrity and competence of the aforesaid Administrators.

The accusation that Anna Rockhill used a "shabby" excuse, in the context in which it appeared, is a further accusation intending to convey to the reader that unprofessional standards were used. The reference to "divine rights" of administration is clearly intended to convey

that Helen Coelho was the victim of authoritarian acts devoid of any objective and fair treatment. We find that this language is in furtherance of the accusation that there was a lack of professional integrity.

The accusation by Puentes that the NEA report was hypocritical in stating that the Board established policy for evaluation procedures of probationary teachers, in the language used, on first impression, might seem to attack the NEA. However, the inescapable inference to the reader is that the Board of Education has not in fact established the probationary teacher evaluation favorably cited by the NEA. We find that this language constitutes an accusation that the Board has not established proper evaluation procedures for probationary teachers and that this accusation is calculated to instill suspicion, particularly among the probationary teachers whose professional future relies thereon, and would further tend to create disharmony among the Faculty, Administration and Board of Education.

In using the language "sham, jargon and juggled statistics" in the context in which they appear we find that Puentes was clearly conveying to the reader that the Board of Education and its Administration had been guilty of deceiving the general public as to quality of education in the Bethpage School District in that such Board and Administrators furnished false and unreliable data and information to the general public within said District.

In summary, the Board of Education further finds that the net impression conveyed to a reader of this letter by the aforementioned accusations by Puentes is that the Administration and the Board of Education, acting individually and in concert, are unfair, unprofessional, false to their duties to properly discharge their assigned tasks.

The Board further finds that these accusations would tend to create disharmony, dissension and suspicion among the Faculty, the Administrators and the Board of Educa-

tion of this District, all of which are inimical to the process of good education in this District.

Superintendent Bryan testified on direct examination that this type of literature could have nothing but a derogatory effect upon education in this District and would tend to destroy the good working relationships between Administration and Staff (p. 183, l. 7 and p. 184, l. 2).

DEFENSES TO CHARGE I

Truth as a Defense

Examination of the letter as detailed in Para. 2 Sub. A of the Charges, referring to the letter of June 18, 1963 by Puentes, states that the supervisor of the faculty member acted on "whim" or a "questionable administrative practice" in matters relating to the retention of Helen Coelho as a teacher in this District. It is clearly established that the supervisor mentioned in this paragraph could only mean Anna Rockhill, Prineipal of the Pine Avenue School.

It is evident from the immediate context in which the words "whim" and "questionable administrative practice" were used that Robert Puentes was conveying to his readers the impression that Principal Rockhill was not guided by professional qualifications and standards in judging Helen Coelho but instead had been promoted by personal considerations devoid of professional judgment. This accusation, if true, would constitute highly unethical conduct on the part of Anna Rockhill and render her unfit for service in her appointed capacity. The evidence received, through the testimony of Mrs. Rockhill and Superintendent's Exhibits 11 through 18 in evidence, which are records of classroom visitations made by Principal Rockhill of probationary teacher Helen Coelho and Superintendent's Exhibits 19 through 21 in evidence, which are records of

teacher evaluations made by Principal Rockhill of probationary teacher Helen Coelho, established that Principal Rockhill did not act on "whim" and that her "administrative practices" followed the policy and standards for probationary teacher observation and evaluation established in the Bethpage School District (p. 429 through p. 633 and Exhibit 5 in evidence, Faculty Manual Part X pp. 81-88). The evaluation reports over a year and a year and a half period clearly establish that Miss Coelho was unsatisfactory or needed improvement in "Materials and Methods of Instruction" and in "Teaching Personality."

The evaluation and observation reports, as well as the direct testimony of Principal Rockhill, delineated among other deficiencies a serious failure on the part of Helen Coelho to encourage and stimulate her students to develop critical, creative and imaginative thinking in accordance with the underlying educational philosophy of this District. Instead, this teacher employed almost exclusively rote and memorization methods thereby causing the students to lose the enrichment available by expanding on a given subject under discussion.

The Board of Education takes note that classroom visitations are designed to improve instruction and to gauge the effectiveness of the total program. The visitation reports themselves assist the teacher by giving constructive criticism to help improve instruction. However, in the instant case, the eight classroom visitation reports indicate that Principal Rockhill was consistent in her criticism of Helen Coelho's presentation of subject matter and teaching methods, and, therefore, corroborate her evaluation reports and direct testimony.

Further uncontroverted testimony from Principal Rockhill showed that in her service as a Principal in this District she has never recommended a teacher for tenure who had received less than satisfactory ratings in any of the

separate items on the evaluation reports, and further, that she would never consider doing so, except in the areas of health and attendance and even then, only under extenuating circumstances.

Uncontroverted testimony was adduced from Superintendent Bryan showing that he also observed Helen Coelho on March 25th and 27th, 1963, found nothing contrary and in fact corroborated the findings of Principal Rockhill.

The Board further notes that Principal Rockhill sent both Miss Kapilian, a special reading teacher, and Miss Brown, Assistant Principal of the Pine Avenue School, into Helen Coelho's classroom on several occasions to provide added assistance to Helen Coelho to adapt to teaching methods employed in this District (p. 463, l. 17 through p. 464, l. 15). In addition, Principal Rockhill, herself, made many other visitations to the classroom of Helen Coelho to provide assistance (p. 496, ll. 1-10).

The Board of Education gave due consideration to the attempt by Robert Puentes to justify by truth the harsh attacks made by him in his letter of June 18th upon the integrity and reputation of Principal Rockhill and Superintendent Bryan in regard to the discharge of their duties in supervising and evaluating Helen Coelho. In the view of the Board the following evidence and testimony to establish such truth was introduced:

Respondent placed in evidence a certain letter from Superintendent Bryan to Helen Coelho dated June 24, 1963 in which Superintendent Bryan complimented Helen Coelho on certain attributes of cultural background, pleasing personality, parental approbation and student results on Iowa tests (Exhibit F in evidence). This letter, while complimenting Helen Coelho in glowing language for the aforesaid attributes and achievements, makes no mention whatsoever and does not even allude to the teaching techniques and methods of Helen Coelho which are the subject of the re-

peated criticism of the evaluation and observation reports of Principal Rockhill and the criticisms of Superintendent Bryan arising from his own direct observations of Helen Coelho. Superintendent Bryan testified that this letter was written at the request of Helen Coelho to show that she did not leave this District with hard feelings after she had already resigned from this District and obtained employment more than a month previously.

The only reference in this letter which can be construed to involve any classroom activity of Helen Coelho was the reference to the Iowa test results. The Board of Education is satisfied that Iowa tests are not one of the measuring criteria of teacher technique and performance in the evaluation procedures. There was no evidence submitted to the contrary by respondent that such tests should be included and we are compelled to accept the uncontroverted testimony of Principal Rockhill and Superintendent Bryan.

The Board of Education, therefore, finds that this letter is devoid of any evidentiary value bearing on the question of the correctness and proper interpretations of the teacher evaluations made on Helen Coelho.

Respondent Puentes, through his witnesses, offered testimony that various letter of parental approbation had been seen by his witnesses. The Board could not place any weight on such testimony in that there was no evidence offered that any of such parents were either qualified to evaluate a teacher or had even observed Helen Coelho in her classroom. At best this testimony could indicate that this teacher was well thought of and enjoyed favorable relations with parents.

John A. Martin testified in behalf of Puentes that he brought a graph to Superintendent Bryan's office on February 14, 1963 purporting to show favorable reading results in Helen Coelho's class. This graph was later identified by Superintendent Bryan as Iowa test results of Helen Coelho's class.

Martin also testified that after Superintendent Bryan observed Helen Coelho he had, according to this witness, spoken to him on the telephone and told him that the students appeared to be absorbing the work. That such a conversation ever occurred is controverted by Superintendent Bryan. The record shows, that John Martin while twice testifying, both on direct and cross-examination, that this conversation occurred within 7 to 10 days after February 14, 1963, and after the observation of Superintendent Bryan, which the testimony clearly and uncontrovertedly shows occurred on March 25th and 27th, 1963.

When questioned on cross-examination as to the accuracy of his 7 to 10 day estimate this witness manifested a loss of memory as to dates which extended from February 14, 1963 at 11:00 A. M. to the end of the summer. A letter in John Martin's own handwriting dated March 8, 1963 conclusively showed that as of that date he was soliciting a response from the Superintendent concerning their conference of February 14, 1963 (Exhibit 27). This witness declined subsequently to set the sequence of events after declining to set the approximate month of certain relevant occurrences and testified that he did not know during the month of May 1963 whether his friend Helen Coelho had resigned from this school district or accepted new employment, even though he admitted that he spoke to Helen Coelho many times during the month of May. He further admitted frequent meetings or contacts with Robert Puentes during which he repeatedly furnished the respondent with information relating to Helen Coelho and conceded that some of this information appeared in the letter of June 18, 1963, which is the subject of this proceeding. This witness' bias, hostility, evasiveness and aforementioned self-impeachment rendered his testimony unworthy of belief by this Board of Education.

Letters of reference from Principal Rockhill to several other school districts written at the behest of Helen Coelho

or in response to inquiries from these districts where Helen Coelho had applied for employment, in no way controvert the evaluations of Helen Coelho by Principal Rockhill. Each of these letters clearly showed that there were certain areas of insufficiency in the teaching capabilities of Helen Coelho and was so indicated by testimony from Principal Rockhill.

Respondent elicited testimony from Principal Rockhill that there were many favorable items in the evaluation reports on Helen Coelho in addition to the unfavorable items. Principal Rockhill testified that for a teacher to achieve tenure she must establish a satisfactory rating in all items with the possible exception of health and attendance where there were extenuating circumstances. No testimony to controvert this standard of teacher competence and acceptability was offered.

Respondent sought to show that Principal Rockhill had acted improperly by suggesting to Helen Coelho in January 1963 that she resign before taking it up with Superintendent Bryan. Principal Rockhill testified that this suggestion was made after the January 1963 evaluation report was given to Helen Coelho and after she had informed Helen Coelho that she was not going to recommend her retention as a teacher in this District. She further testified that her reason for suggesting resignation was to permit Helen Coelho to resign and give her own reasons rather than to cause her to be discharged and have this appear in her record. She offered further uncontroverted testimony that this was a common practice in the educational field. Respondent further sought to show that Principal Rockhill had acted improperly by withholding a third year salary notice from Helen Coelho on or about the time of the Easter vacation in 1963.

Inasmuch as Principal Rockhill, based upon competent professional judgment and in accordance with district eval-

uation procedures, had determined not to recommend retention of Helen Coelho for an additional school year, we see no impropriety in the suggestion that Helen Coelho resign, particularly when hereafter this Principal, on request of Helen Coelho, recommended to Superintendent Bryan that he make a further review of her own determination by observing Helen Coelho's classroom performance. We accept the explanation offered by Principal Rockhill that her sole reason for so doing was to prevent any professional damage that may have followed an official dismissal. We find the respondent's objection as to non-delivery of a salary notice for the third year without merit in view of the foregoing. Furthermore, the salary notice was withheld with knowledge of the Superintendent and occurred after notice by Helen Coelho of intention to resign.

The Board finds that classroom visitations and evaluation reports made by Principal Rockhill in the course of her assigned duties over a two year period and before the issuance of the letter by Robert Puentes do not constitute a "whim" or "questionable administrative practice" and that these accusations are false.

In regard to Para. 2 Sub. (b) and Para. 2 Sub. (c) of the Charges wherein Puentes in his letter of June 18th accuses district Administrators of acting out of "Political Considerations", employing a "shabby excuse", subordinating a teacher's competency to "divine rights", and committing wrongful acts toward Helen Coelho, and refusing to rectify same for "contemptible political reasons", the Board of Education finds that Miss Coelho was given the same consideration accorded to any probationary teacher in the Bethpage School District and in addition received extraordinary consideration by the Superintendent, himself, and by Principal Rockhill, and these facts coupled with the foregoing evidence and findings establish that these accusations are false.

Decision of Board of Education

In regard to Para. 2 Sub. (d) of the Charges wherein Robert Puentes in his letter of June 18th cites a recent NEA report claiming that the Bethpage Board has established policies for evaluation and review of probationary teachers' services as hypocritical, the Board of Education finds this allegation in the Puentes letter false. The respondent offered no evidence in support of this accusation and such evidence as exists in the record points to the contrary. The Board of Education notes in Superintendent's Exhibit #5 in evidence, a Faculty Manual, which is distributed to each teacher when employed and brought up to date at each teacher orientation meeting, that in Part X, pages 81 to 88, that classroom visitations and teacher evaluations are discussed at length. In particular, visitation and evaluation forms, their description and use, are set forth. The material included in this Faculty Manual forms part of the terms for employment in this District, and was well known to probationary teacher Helen Coelho during the period she taught in the Pine Avenue School and was also well known to Robert Puentes and all teachers in the District. The Board considers without merit the accusation by Robert Puentes that such teacher visitation and evaluation procedures are hypocritical when the charge is levied only after a conclusion has been reached from such procedures that a particular probationary teacher will not be recommended for re-employment. The accusation by Puentes would have been more consistent if made at the time of formation of such procedure by the joint teacher-administrator committee.

In regard to Para. Sub. (e) of the Charges, wherein Puentes in his letter of June 18th indicates that any claim of real education in Bethpage is based on "sham, jargon or juggled statistics", the Board of Education finds this accusation in the Puentes letter to be completely unfounded.

Decision of Board of Education

This accusation by Puentes constituting a broad attack upon the integrity of the Administration and the Board of Education is totally unsupported by the evidence adduced in the hearing. Respondent's sole effort to justify this attack came through the testimony of Frank Sabatella, Principal of the High School. This Principal complained that the weighting method used in ranking 19 educational practices in the district which are set forth in the May 1963 Educational Bulletin, in evidence Exhibit R, and relating to data supplied through a parent opinionaire on these practices, was incorrect in that it accorded a weight to the parental response "no opinion", Principal Sabatella contended that no weight should have been given to the reply "no opinion". This testimony was controverted in rebuttal by Dr. James D. Lawson, Assistant Superintendent of Schools in this District, who insisted that the report to the public would be less complete if it did not give weight to replies of "no opinion", thereby overlooking an indication of poor communication between the school and the parents. Neither witness supported the thesis that using the statistical weighting system actually used in the May Bulletin had the effect of improving the educational image of the District before the public. In fact Sabatella testified that the weighting he preferred would very possibly have made the High School look better. Dr. Lawson flatly testified that there was no possibility in affecting the educational image of the District one way or the other by using either statistical weighting, since the sole possible difference between the two systems would be to change the ranking of 19 different items which had equal importance.

Respondent further sought to show that although the parents in the May Bulletin were given the ranking arrived at by weighting the "no opinion" response, the Building Principals were furnished an additional report wherein the parental responses were ranked with and without the "no opinion" response. Dr. Lawson testified that this was done

pursuant to the request of the Administrative Council so that Principals if they so desired could determine the effect on their own school's performance if the rankings were not affected by the "no opinion" replies. The Board further notes from the testimony that the May 1963 Educational Bulletin, which the respondent attacks, was favorably cited by the Department of Education as one of the best in the State and advised Superintendents throughout the State to obtain copies for their own perusal (pp. 740-746, pp. 1131-1186).

The Board finds that since the educational image projected to the public could neither be enhanced nor diminished by whatever weightings were used that this evidence relating to the weightings used, does not in any manner serve to verify the respondent's accusation that the Board of Education or Administrators are seeking to create deceptive proof as to the quality of Education in Bethpage.

We therefore find that the respondent in accusing the Administrators and Board of Education of using "sham, jargon, and juggled statistics" to create misleading proof of good education in Bethpage, had made an unjustifiable and false attack on the integrity and competence of the Board of Education and its Administrators.

Legal Privilege as a Defense

In addition to claiming truth as a defense, respondent sought to borrow the defenses of legal privilege in actions involving defamation, with the apparent contention that if he could establish such a defense he would be absolved even in the absence of truth.

We disagree that legal privileges available in defamation action constitute a defense for a teacher charged pursuant to Section 3012 with Conduct Unbecoming a Teacher. While we have shown our willingness to entertain truth as

a defense with the thought that improper acts by public officers in the scope of their duties should not be protected in the face of wrongdoing, we cannot agree, however, that anything less than responsible, careful and truthful criticism can be tolerated in the Educational field in instances involving harsh accusations against educational administrators and boards of education. In the instant case however, we find for the reasons following, that the respondent has not established a legal privilege.

1. Absolute Privilege—

Even where a person is acting as an officer of an organization he is never entitled to an absolute privilege other than in court proceedings and legislative bodies. Certainly, in the instant case, respondent's letter cannot qualify for such privilege.

2. Qualified Privilege—

Respondent sought to establish qualified privilege on the grounds that he was acting as the President of the Bethpage Federation of Teachers Local 1379 AFL-CIO.

Even if such privilege existed it would be destroyed by malice. We find that the letter of Puentes dated June 18, 1963 indicates malice in that the language used therein is unnecessarily vitriolic for any legitimate purpose such letter could have. Furthermore, while purportedly a letter written in aid and concerning Helen Coelho, the letter goes on to attack both the NEA and the Board of Education in a manner wholly unrelated to the Coelho incident thus disclosing a generalized malice.

Furthermore, there can be no qualified privilege where the offending publication is circulated not only beyond members of respondent's own organization but also with no concern that same could readily come into the hands of non-professional personnel and others. Such unrestricted circulation occurred in this case.

Finally, the very claim that respondent was acting as an officer of the Union was not established by the respondent in this case.

The testimony adduced at the Hearing from Witness Valenti, the Secretary of the Union, and a member of the Executive Committee, and James Wright, a member of the Executive Committee, shows that the organization, at a regular meeting called June 5, 1963, gave Puentes and four other members of the Executive Committee the right to investigate a matter pertaining to an elementary school teacher and take whatever action they deemed necessary. Upon cross-examination, John Valenti testified he did not know how many members were at the June 5, 1963 meeting (p. 916); "there was probably about fifteen". He testified he was a charter member of the organization and had been in it three or four years (p. 917, l. 2). He testified he was the Secretary of the organization, but neither he nor any one else usually takes minutes.

James Wright testified on cross-examination (p. 948) that the Secretary usually takes minutes. Again on page 961, the witness answered that his authority to act as a member of the Executive Committee was obtained from the Bethpage Federation of Teachers, its Constitution and By-Laws (p. 961). When the witness was asked when he last read the constitution he stated he could not remember (p. 963), and again (p. 967) the witness stated that the Constitution makes no mention of a Quorum necessary for a meeting of the Executive Committee.

John Valenti, recalled as a witness, testified (p. 1084) that the copy of the Constitution shown him (Exhibit 29), was not the Constitution the Federation was operating under for the last year or two (p. 1084). When shown another document (Exhibit 28), he stated that he thought it was the present Constitution—but as Secretary he had no records or minutes. The witness' prior testimony was re-read to him regarding his knowledge as to whether the Constitution

was amended and he testified (p. 1087) that he did not remember whether it had been amended or not. The Board has reviewed the two Exhibits—the first Constitution (Exhibit 29), which is not dated, clearly defines the title of the organization as Bethpage Federation of Teachers Local 1379, Union Free School District 21. It acknowledges that it has a parent organization. It details the duties of all officers and we note that the Secretary is required to keep minutes and records. It sets forth the number of members required to constitute a quorum for a general meeting and an executive meeting (Art. 8 Secs. 1 & 2) and the number of votes from members necessary to amend the Constitution (Art. 10).

The Board reviewed the Second Constitution (Exhibit 28), which is also without date. This instrument states in its preface that the organization is an autonomous body and not affiliated with any parent organization (Paragraph 3). It does not outline specific duties for officers and it makes no statement that the Secretary is to keep minutes and records (Paragraph 5A). Finally, this document makes no mention of the number of members necessary to constitute a quorum—it gives unbridled power to the Executive Committee, who do not have to meet together but who may be consulted at random by the Chairman, without observing how other members of the Executive Committee vote. The Chairman (Puentes), may as authorized by this undated document, poll the four other members of the Executive Committee separately and proceed to bind the organization.

The Board notes further that the letter delivered to Superintendent Bryan by Puentes(supra) dated June 18, 1963 is written under the letterhead of the Bethpage Federation of Teachers Local 1379—clearly indicating that the letter came from that organization—signed by the President, Robbert Puentes. It is questionable from the documentary evi-

dence above whether the Second Constitution (Exhibit 28), has any validity; that if it was ever legally enacted, there is no proof that two-thirds of the then existing membership ever authorized amendment of the original, and further, that the official correspondence is written upon stationery authorized by the first Constitution.

Assuming this organization was acting under the first Constitution, no proof was offered that it authorized Puentes to proceed with the writing of the June 18, 1963 and mimeographed copy thereof, since there is no evidence that a duly constituted meeting of members authorized the Executive Committee to act. In addition, there is no proof that a quorum of the Executvie Committee (75 Percent) (Art. 8 Sec. 2) met to give authority to Puentes to proceed with the letters.

It follows that Puentes had the burden of proving that the letters signed by him and later distributed, were authorized by the Bethpage Federaiton of Teachers, Local 1379 AFL-CIO. He has failed through his witnesses to prove that such authority was given.

In any case, it is difficult for this Board to see how any action of the Federation can be valid when no minutes are kept and the members of the Executive Committee do not know by which Constitution they are governed.

Constitutional Defenses

Article I, Section 8 of the Constitution of the State of New York

The Board of Education finds that respondent's contention that his statements are protected under the constitutional guarantee of free speech is wholly without merit. Neither Federal nor State constitutional guarantees of free speech were ever intended to furnish unbridled license to inflict damage on others either negligently, recklessly or ma-

liciously, but rather, such guarantees are intended to protect against prior restraint leaving the citizen responsible for abuses of his constitutional privilege.

Article I, Section 17 of the Constitution of the State of New York

Though it is difficult to conceive in which manner respondent felt that this constitutional provision provided a defense to the charges herein, which in the opinion of the Board is wholly unrelated, he did nevertheless, through counsel repeatedly interpose it, by way of complaining that the Board of Education was interfering with the organizational rights of the Bethpage Federation of Teachers Local 1379 AFL-CIO. The sole evidence by respondent was that the Board of Education had failed in the past to answer letters from the Union. Other evidence did show that the Board of Education furnished meeting rooms in the District schools, and permitted distribution of Federation letters to the Faculty in the schools. In fact it was through this very privilege of distribution that respondent launched his attack contained in the mimeographed copy of the June 18, 1963 letter against this Board of Education, its Administrators and the educational image of this District. We find that any claim of interference with organizational rights is totally unfounded.

Section 108, Subsection I of the Civil Service Law of the State of New York

The Board also rejects the argument made by Puentes that in distributing and authoring the letter of June 18 and mimeographed copy thereof, he was protected by Section 108 paragraph I of the Civil Service Law. A reading of this Section clearly indicates that it deals with strikes by

Public Employees. The limitations contained in this paragraph deal only with strikes by public employees and the penalties to be assessed against them. Nothing in this Section gives employee additional rights which he would not have had prior to the enactment of this Section.

The Board of Education has given due consideration to the repeated claim made by Counsel for Puentes that so long as there was no evidence that Puentes failed to discharge his teaching duties in the classroom and in fact continued to perform his duties in the classroom, that Charge I cannot be sustained. With this contention the Board of Education emphatically disagrees. The duties and responsibilities of a teacher do now and always have encompassed a greater area within the educational system than classroom teaching alone. Professional duties require inter-faculty and administrative contacts in matters involving educational programs, the establishment of curricula, parent-teacher conference, preservation of the dignity and decorum of the educational system and a host of other activities wherein professional respect and confidence are vital.

FINDINGS OF FACT AS TO CHARGE II

In regard to Charge II wherein Puentes is charged with insubordination against the Administration and the Board of Education of Bethpage, the Board of Education takes notice of the definition of insubordination contained in Webster's New International Dictionary, Second Edition, Unabridged 1960, which states:—Insubordination—quality or state of being insubordinate; mutiny; insubordinate. Not subordinate; specif: a) Not submitting to authority, disobedient; mutinous. Syn. see contumacious.—and as contained in the Shorter Oxford English Dictionary (1959) which states: Insubordination. The fact or condition of being insubordinate; resistance to or definance of authority;

disobedience. The Board of Education finds that Robert Puentes by authoring, publishing and circulating the letters of June 18, 1963, did by such action constitute and encourage a defiance and contempt of duly constituted authority and that such action was and is contumacious.

Defenses of Charge II

The Board of Education did not ascertain any new defenses in defense of this charge other than those previously interposed in defense of Charge I.

FINDINGS OF FACT AS TO CHARGE II A

The Superintendent of Schools of Bethpage School District charged Robert Puentes with direct insubordination in that he refused on direction from the Superintendent to answer questions put to him regarding his activities in connection with Exhibits A and B and his activities during periods when he was on duty as a teacher in the district.

Robert Puentes, according to the direct testimony of Superintendent Bryan, declined to answer without the advice of Counsel (pp. 161, 169).

Superintendent Bryan further testified that on a prior occasion (memo November 2, 1962) he had questioned Puentes regarding his activities during a school day as they affected school interests. A summary of the questions asked by Superintendent Bryan and the answers given by Puentes, together with an admonition by Superintendent Bryan to Puentes regarding his failure to answer questions of the Superintendent, was introduced in evidence and marked Superintendent's Exhibit 9.

The Board finds that Puentes deliberately refused to answer questions put to him by Superintendent Bryan even though he was warned that he was expected to do so on a

prior occasion. The Board further finds that such refusal to answer reasonable questions constituted a disobedience to a lawful authority.

Defenses of Charge II A

Robert Puentes, in defense of his refusal to answer, states that the questions dealt with his activities as a Union member and that they could not be placed before him personally.

The Board finds that the Superintendent asked no questions concerning the Union.

The Board further finds that the Superintendent had every right to inquire into the activities of a school teacher under his jurisdiction and supervision as such activities affect school interests and, since the questions were reasonable, Puentes had a duty to answer.

CONCLUSIONS

A. Determination of Guilt

1. The Board of Education after due consideration of all the evidence and testimony introduced through this hearing and after weighing all the defenses interposed for the respondent does hereby determine that Puentes, a teacher in the Bethpage High School, is guilty as charged of Conduct Unbecoming a Teacher on each and every count, as specified in the Charges of Superintendent Charles H. Bryan, dated and filed with the Board of Education, U.F.S.D. #21, Town of Oyster Bay, Nassau County, New York, June 22, 1963, enumerated above and known as Charge I, para. 1, 2a, b, c, d, e, 3, 4, 5, and 6 under Section 3012 of the Education Law of the State of New York.

2. The Board of Education further determines that Puentes is guilty as charged of Insubordination as specified in the aforementioned charges of Superintendent Charles H. Bryan and known as Charge II under Section 3012 of the Education Law of the State of New York.

3. Finally, the Board of Education determines that Puentes is guilty as charged of Insubordination as specified in the aforementioned charges of Superintendent Charles H. Bryan and known as Charge II A.

B. Assessment of Penalty

1. The Board of Education after due deliberation orders that Robert Puentes be suspended without pay from his position and be relieved of all duties as a teacher in the Bethpage High School of U.F.S.D. #21, Town of Oyster Bay, Nassau County, New York, starting immediately and for the remainder of the current school year through June 30, 1964, as a result of the determination of his guilt herein above set forth on Charge I.

2. The Board of Education further orders that Robert Puentes be suspended without pay and be relieved of all duties in this district for a period of approximately seven and a half months as a result of the determination of his guilt hereinabove set forth on Charge II, such suspension to run concurrently and be coterminous with the suspension levied above.

3. The Board of Education further orders that Robert Puentes be suspended without pay and be relieved of all duties as a teacher in this District for a period of approximately seven and a half months as a result of his guilt hereinabove set forth on Charge II A, such suspension to run concurrently and be coterminous with the suspension levied in conjunction with his guilt under Charge I.

Decision of Board of Education

4. The Board of Education further orders Robert Puentes to cease and desist from similar activities complained of in Superintendent Charles H. Bryan's charges dated June 22, 1963 and hereby gives notice that such similar activity and each of them if they occur will be treated as dismissal offenses by this Board of Education.

5. The Board of Education takes note that in reaching a decision as to the penalties levied they were influenced by the following considerations:

A. The long term of service of Robert Puentes in this District

B. The substantial benefits occurring to Robert Puentes as a result of his long term of service and ture held in this District

C. The fact that all of the charges flowed from a single set of circumstances

D. The classroom performance of Robert Puentes.

The above findings, conclusions and determinations are the result of a unanimous opinion of the seven members of the Board of Education, Union Free School District #21, Town of Oyster Bay, Nassau County, Bethpage, New York, whose signatures appear below. Board members, Tilley, Levine, Campagne, Coyle and Villafranca were present during the entire hearings with the exception that Mr. Villafranca missed portions of Counsel's opening address, and the above mentioned Board members have reviewed the record and exhibits.

Board members LoFaso and Hilton certify that they have read the entire record and have examined the exhibits

with particular attention given to that part of the hearing that they were unable to be present.

Dated: November 12, 1963

(signed) RICHARD E. TILLEY
Richard E. Tilley, Chairman and President.

(signed) MARK LEVINE
Mark Levine, Vice President

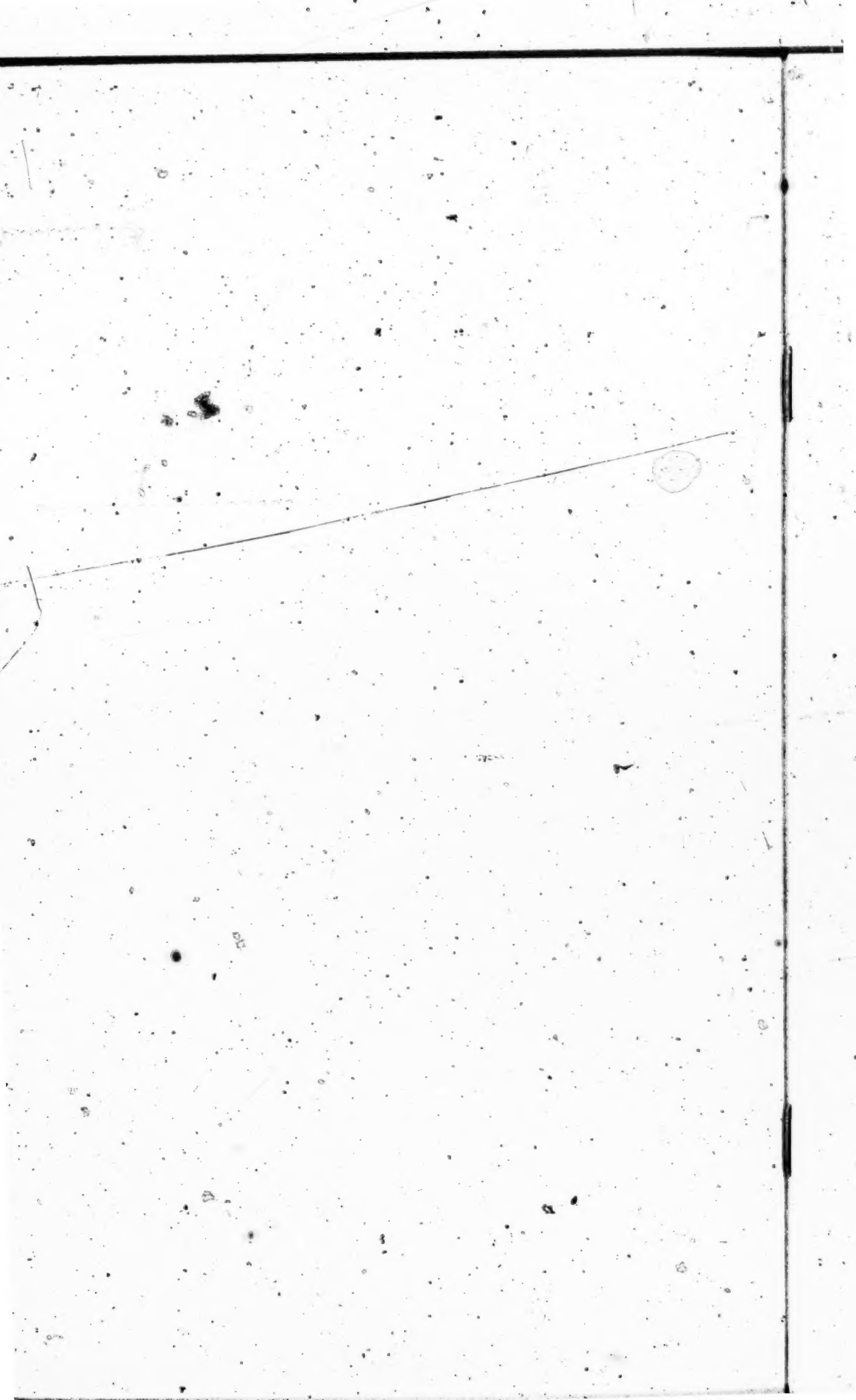
(signed) CHARLES CAMPAGNE
Charles Campagne

(signed) HUGH J. COYLE
Hugh J. Coyle

(signed) LEE HILTON
Lee Hilton

(signed) ANTHONY J. LOFASO
Anthony J. LoFaso

(signed) MARIO A. VILLAFRANCA
Mario A. Villafranca



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 562

ROBERT PUENTES,

Appellant,

v.

THE BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 21, TOWN OF BETHPAGE, NASSAU COUNTY, NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

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EUGENE R. HURLEY, JR.,
of Counsel.

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Other Authorities Cited

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States moves to dismiss on the grounds that the question is so unsubstantial as not to need further argument.

Questions Presented

1. Is a public employer absolutely restrained from disciplining its employees for utterances directed against the

employer—despite the detrimental effects of those utterances—unless it is found that they were made with "actual malice" as defined in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 280, 80 S. Ct. 710, 11 L. Ed. 2d 686 (1964)? or

2. Is the public employee to be disciplined only in those cases where it is shown by substantial evidence that the utterances were calculated to and did work substantial injury to his employer even though they might not be such as would entitle the employer to seek damages for defamation?

Statement of the Case

The appellant is a teacher in the Bethpage Public Schools. On June 18, 1963, during and before school hours, he caused to be distributed among the Bethpage faculty, administrators and school board the letter set forth in appellant's Jurisdictional Statement (pp. 7-9). As a result of the distribution of the letter and appellant's subsequent refusal to answer questions about it put to him by the Superintendent of Schools, charges were preferred against appellant. A trial was held before the School Board. The appellant was found guilty on all charges (except one which was withdrawn at the outset of the trial). A penalty of suspension, without pay, for a period of seven and one-half months was imposed and the appellant was further ordered to desist in the future from activities similar to those complained of in the charges (Appellant's App. pp. 12-42).

There were two charges. The first (Misconduct) was that appellant wrote and distributed the letter containing accusations against the Board, the Superintendent and one of the Principals of an elementary school, which letter was designed to hold the administrators of education in the District up to contempt and ridicule, and to create suspicion, dissension and disharmony among the Board, the Administration and the Faculty of the District.

The second charge (Insubordination) was that when questioned by the Superintendent concerning his activities in connection with the writing and distribution of the letter, the appellant refused to answer without the advice of counsel. It was further charged that the writing and distribution of the letter which formed the basis of the first charge constituted insubordination against the Administration and the Board of Education, in that they constituted and encouraged a defiance and contempt of the authority of these bodies and were contumacious in character.

The letter states that it is being written to obtain justice for a probationary teacher in the third grade of an elementary school—a Miss Coelho—whose employment for the following year has not been recommended by the principal of her school. It describes Miss Coelho as the victim of the principal's whim and states that contemptible political considerations and questionable administrative practices in this District outweigh Miss Coelho's obvious merits. The letter goes on to allege that this painfully evident discrimination and injustice has so increased the skepticism of the faculty whose respect for the procedures of the District is already dangerously low, that the action is hypocritically sought to be justified by shabby excuses which are simply sham, jargon or juggled statistics.

Both the original letter and the mimeographed copy distributed to the Faculty and the Administration were introduced as exhibits, and are discussed in detail in the Board's decision (Appellant's App. p. 12). That the statements were defamatory and were made recklessly, with no genuine concern for the facts surrounding the Coelho matter, is evident from a reading of the letter.

The circulation of this letter was not only intended to, but did discredit, harass and interfere with the administration of the school system in the District. To minimize, as far as possible, the damage to education, amounting substantially to a public scandal, the Board not only was justi-

fied in suspending the appellant, but under all the circumstances, could properly have dismissed him instead of merely suspending him for a short term.

Even the appellant seems to have realized how serious an effect the letter would be likely to have. Though he personally gathered the data for it, composed it and distributed it, he took various evasive measures to conceal or becloud his personal responsibility, such as writing it on the stationery of a labor union, stating under his signature that he was the president of the Union, equivocating on his personal distribution of the letter (some of the letters were sent in the inter-school mail system), refusing to answer the Superintendent's lawful questions about it without advice of counsel, and the like.

That the injury to the School District and its administrators was intended and deliberate and was wanton, and malicious, is readily apparent if the chronology of the events leading up to the writing and circulation of the letter is considered.

The appellant, at all times was the president of a Union known as Bethpage Federation of Teachers. This Union was substantially a paper organization, keeping no record of its meetings or proceedings and with no accurate membership list. It was not recognized by the School Board, and carried on no negotiations of any kind with the School District. How many members it had does not appear, but Miss Coelho was not a member, and prior at least to June 5, 1963 was unknown to the appellant and to most, if not all of the other members.

Miss Coelho was a probationary teacher in the third elementary grade of the Pine Avenue School. Her teaching experience had been in India and England, and her methods were influenced by this previous training. The principal of this school early in 1963, after numerous evaluation and observation reports on Miss Coelho's classroom teaching,

had come to the conclusion that the rote and memorization methods employed almost exclusively by Miss Coelho were at serious variance with the educational philosophy of the District, which guided the other teachers.

The Principal, Mrs. Rockhill, stated that she gave Miss Coelho more opportunity to conform her teaching methods to the methods employed by the Bethpage School District, than she would to the ordinary probationary School Teacher, but Miss Coelho could not or would not conform.

—May 16, 1963—Miss Coelho, pursuant to her application, was accepted as a teacher for the coming year in the Jericho School District.

—May 21, 1963—Miss Coelho, wrote to the Superintendent of the Bethpage District declining re-appointment because she had accepted the appointment in Jericho.

—May 28, 1963—Superintendent replies, advising that her resignation has been accepted as of June 30th.

—June 4, 1963—A Mrs. Vredenburgh calls Mr. Puentes to ask him to meet with Miss Coelho on June 7th (A121).* This is the *first* time appellant has heard of Miss Coelho.

—June 5, 1963—A meeting of the Union at which 15 members were present. Appellant spoke about Miss Coelho. The meeting authorized the Executive Committee, of which the appellant was one of the five members, to go ahead and look into the matter and take what action was necessary (A110).

—June 7, 1963—Appellant has first meeting with Miss Coelho.

—June 12, 1963—Mr. Wright, another member of the Executive Committee meets with appellant (A111) and

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* The symbol "A" refers to the pagination contained in the appendix to Petitioner-Appellant's brief to the New York Court of Appeals which is part of the designated record herein.

gives him authorization to write and distribute the letter (A112).

—June 18, 1963—The letter and mimeographed copies are distributed.

On that state of facts, it is apparent (and it must have been apparent to the appellant) that the letter of June 18th would be of no help in gaining for Miss Coelho a renewal of her contract with the Bethpage School District for another year, since she had already accepted employment on May 16, 1963 at the Jericho School District.

The real and only possible purpose of the letter was to use sympathy for Miss Coelho as support for charging appellant's employer with "sham, jargon, juggled statistics, hypocrisy"; with using shabby excuses for contemptible political reasons to perpetuate a glaring wrong on a probationary teacher and thus, allegedly, increase the skepticism of the rest of a faculty, whose respect for the procedures of the District was already dangerously low. The Board's conclusion that "these accusations would tend to create disharmony, dissension and suspicion among the Faculty, the Administrators and the Board of Education inimical to the process of good education in this District" is clearly substantiated by the record. The language of the letter fairly supports much harsher characterization of its intent and probable effect than that found by the Board.

In his Jurisdictional Statement and at the hearing, appellant claims that even if the letter is intemperate, false or malicious, its writing and distribution cannot be misconduct or insubordination on his part, no matter what the effect on the discipline, morale or efficiency of the school, because his right to criticize or complain on matters relating to conditions and betterment of public employment are protected by the First and Fourteenth Amendments to the Constitution of the United States.

This view was specifically rejected by each and every justice and judge in the Appellate Division and the Court of Appeals. The majority in each Court found that there was "substantial evidence" to support the verdict. The minority—represented by Justice Rabin's dissent (Appellant's App., p. 9) apparently felt that, in light of the freedom conferred by the First Amendment, more explicit proof of injury must be required by the courts before it can be said that the verdict is supported by "substantial evidence".

Argument

1. The appellant has advanced a novel argument to support his contention that he has been deprived of a right under the First and Fourteenth Amendments to the United States Constitution. While admitting that a public employee may be disciplined for utterances directed against his employer, he contends that the penalty may be invoked only if the utterances (a) wreak substantial injury and (b) are made with "actual malice." Injury, no matter how substantial, is not enough. The employee also must either know the statements are false or be so reckless as to totally disregard whether they are true or false.

We have only to consider the consequences of applying such a rule of law to all disciplinary hearings to see how unsubstantial is the question presented. Had the statements made by the appellant been part of a speech which incited others to riot, we might be faced with the anomaly of having sufficient evidence to convict the employee of a crime but, on the same set of facts, lack sufficient evidence to discipline him as an employee.

Examples such as this could be found in any form of employment, whether it be public or private. Suppose, if you will, that the Chief Clerk of this Court should tell the newspapers that one of the Justices personally believes

that almost anyone who refuses to sign a "loyalty oath" is a Communist. Whether the statement was true or the Clerk only reasonably believed it to be true, whether the personal beliefs of the Justice in any way affected his decisions in loyalty oath cases, are questions which might never be resolved—since they involve subjective considerations. One thing, though is certain. The injury to the prestige of the Court would be severe. Yet it is the appellant's view that since the Justice may not sue the clerk for libel, the Court may not discipline the Clerk for his remarks.

And what would be the result of failing to discipline the Clerk? Our experience teaches us that it lends an aura of credibility to the tale. This may be a risk that "public officials" must accept when the remarks are made by the ordinary citizen, but when the ordinary citizen is also an employee, there is no reason why the risk should be multiplied to include job insurance for the employee who has wrecked the business.

2. One of the fundamental defects in appellant's argument is the failure to recognize that the roles of citizen and employee are not necessarily identical. We may all agree with Mr. Justice Schaefer's remarks that,

> "Teachers are not necessarily the best critics in matters of school finance and administration, but they are in closer contact with the actual operation of the schools than anyone else, and the public should not be deprived of their views." *Pickering* v. *Board of Education,* 36 Ill. 2d 568 at 584, 225 N. E. 2d 1 (1967).

However, what Mr. Justice Schaefer fails to point out is that the very closeness of the teacher to the schools requires that he exercise a much greater degree of care when speaking of them than might be required of the ordinary taxpayer. The position which he holds increases the probability that his remarks will be believed. The ability to make

others believe carries with it the capacity to injure those about whom the remarks are directed; and as the capacity to injure increases, the duty to exercise care increases correlatively.

Whether the speech by an employee passes beyond the permissible bounds should be measured by the extent of his duty to exercise care and restraint. This, in turn, depends on all the facts and circumstances of the case. To establish a rule of law that any public employee may show his defiance and hostility and cause his employer substantial injury while all but guaranteeing the wrongdoer his position is not law but license.

A hundred years ago in Nassau County, New York, an elected trustee of a school district who exercised his undoubted right of correcting a teacher employed by the district, but in such a way as to upset the discipline of the schools, was not merely suspended but was actually removed from office.

"In 1851 Elisha Bedell, Trustee of District No. 1, Hempstead, actually disturbed and interrupted the class taught by Mary Augusta Brown. In the presence of the students he 'used angry and abusive language to the teacher, openly countermanded her orders in conducting school and caused the school to be thrown into disorder.' Because of these actions . . . he . . . (was) removed from office by New York State Superintendent of Schools, Christopher Morgan." *Common Schools in Hempstead, North Hempstead and Oyster Bay 1800-1860,* Edward J. Smits, Nassau County Historical Society Journal Vol. XXVII, No. 1, pages 31-32.

If the trustee's opinions had been vented privately it might have been a proper and commendable discharge of his duty and well within his rights. So too with the appellant, Mr. Puentes. It was not the exercise of free speech that was condemned in each case. It was the manner in which that exercise took place. *Accord*: *Swaaley* v. *United States,* 376 F. 2d 857 (U. S. Ct. Cl. 1967), holding that a

defamatory letter addressed to the employer and delivered only to him was not grounds for dismissal. ". . . (I)f he had indiscriminately distributed copies, the issue here would be entirely different". *Id.* at 862. See *Stein* v. *Oshinsky,* 348 F. 2d 99 (2d Cir.), cert. denied, 382 U. S. 957 (1965), where the Court held that the refusal by the School Board to permit voluntary student initiated prayers in school is not a violation of the students' constitutional right to free exercise of religion or free speech. The children would have to content themselves with saying the prayers before nine or after three. Cf. *Kidder* v. *Chellis,* 59 N. H. 473 (1879).

3. The cases cited by the appellant to support his position are not relevant to the issue presented. He has placed great reliance on the recent cases of *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967), and *Garrity* v. *State of New Jersey,* 385 U. S. 493 (1967). He has sought to bring this case within the orbit of other notable decisions such as *Wieman* v. *Updegraff,* 344 U. S. 183 (1952); *Torasco* v. *Watkins,* 367 U. S. 488 (1961); *Slochower* v. *Board of Education,* 350 U. S. 551 (1956).

However, each of these cases involved either the absolute surrender of a constitutional right as an incident to obtaining or retaining public employment or the real threat that public employment could be terminated by the mere advocacy of or advice about abstract ideas. In the case of *Keyishian* v. *Board of Regents, supra,* for example, the statutes in question were unconstitutional because they might easily be construed to prescribe punishment in the absence of any proof of harm. In all of the other cases cited employment was terminated or denied—in the absence of proof of any harm—through the mere exercise of a constitutionally protected right.

In the present case, as in all disciplinary proceedings, it is the presence of provable harm which makes the statute

operative. It is not the exercise of the constitutionally protected right which is punishable. It is the actual harm, if any, which results from its exercise. Even rights protected by the First Amendment are subject to regulation when their exercise threatens society. Cf. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940) (dictum).

4. The cases cited by the appellant and referred to in the preceding section (3) demonstrate yet another weakness in appellant's argument. Public employees suffered all too long under disabilities which were not to be found in private employment. Few if any contracts of employment in the private sector required dismissal for the mere exercise of a constitutional right. All too often, this same requirement was present or implied in contracts of public employment.

The trend of recent cases has been to remove these disabilities so that the "tenured" public employee stands on an equal footing with the contract employee in private employment. What the appellant proposes is not to further equalize the balance but to confer on public employees a special privilege to do infinite harm in any circumstance so long as "actual malice" cannot be proved.

It goes even beyond that, however. Where prior decisions have all been predicated on the theory that the state may not dismiss an employee merely for his thoughts or the exercise of his constitutional rights, the gist of appellant's argument is that the only proper ground for disciplining a public employee is an inquiry into what he knew or did not know before he made the statements. In short, says the appellant, it is the employee's thoughts, not his statements which really count. The argument has come full cycle. The unconstitutional act of the state now becomes the constitutional privilege of its employees.

Such a doctrine is so at variance with the pronouncements of this Court in the past as to strip from appellant's

argument whatever substance or reason it seemed at first to possess.

5. There is no substance whatsoever to appellant's argument that he was acting for and on behalf of a union to safeguard the proper interests of all employees. The findings of the Board of Education clearly indicate the "make weight" nature of this contention (Appellant's App. pp. 32-35 and p. 36).

6. Even were we to assume that there was some substance to appellant's argument and that "actual malice" is the true test to be employed in disciplinary proceedings of this type, there would be every reason to conclude from the facts adduced that the appellant either knew that certain statements were false or that he showed a reckless disregard of whether they were true or false.

We must remember that this case was tried prior to the decision in *New York Times Co.* v. *Sullivan, supra.* At the time no such findings were thought to be necessary. However, the Board heard evidence on every point in the letter. Their findings on every point were detailed. Certain accusations were false. Perhaps Mr. Puentes was unaware of their falsity; but in that event, the truth could easily have been ascertained by inquiries made of the principal or the Superintendent or both. No such inquiries were made. As this Court said only a few months ago in *Curtis Publishing Co.* v. *Butts* and *The Associated Press* v. *Walker,* 388 U. S. 130, 87 S. Ct. 1975, 1993 (1967):

> "Elementary precautions were nevertheless ignored. The . . . Post knew that Burnett had been placed on probation in connection with bad check charges, but proceeded to publish the story on the basis of his affidavit without substantial independent support. Burnett's notes were not even viewed by any of the magazine's personnel prior to publication."

Even a cursory glance at the facts in this case reveals that there is very little, if any, difference between the actions taken by the Saturday Evening Post and the appellant, Robert Puentes.

CONCLUSION

We respectfully submit, therefore, that the appellant presents no substantial question for the decision of this Court, and that the appeal should be dismissed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

PUENTES *v.* BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 21.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 562. Decided June 17, 1968.

PER CURIAM.

The judgment is vacated and the case is remanded to the Court of Appeals of New York for further consideration in light of *Pickering* v. *Board of Education*, No. 510, decided June 3, 1968.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the judgment should be reversed.

MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted and the case set for oral argument.